

To: The Sunshine Reform Task Force
From: Public Records Subcommittee
Subject: Opening police records
Date: 9/4/07

California law sets a clear standard of openness for government records. In almost every information category, all records are open – except for the small number of items whose disclosure might hinder the workings of government or improperly compromise personal privacy. But for police records, that standard is reversed. Unlike sunshine laws around the country, California's public records act makes only a select number of key facts public for each police-involved incident or arrest, while allowing all other information to remain secret, at the discretion of the police department. As the public records subcommittee learned during its weeks of work on this issue, the result of this approach is that most police records and much information about police activities are kept from the public at large.

By a unanimous vote, the Public Records subcommittee offers the attached draft language in hopes of opening many records of the San Jose police department to public scrutiny. The subcommittee believes this move will enhance the trust between the department and the residents it serves, and better inform the residents of San Jose about crime in their midst and the nature of police work. Our proposals would establish a level of openness unprecedented in California local government, although it is common in many other states. The subcommittee believes that San Jose, a city with a well-respected police department and a new commitment to the public's right to know, is well-situated to lead the way.

Here's a look at our recommendations.

Departmental reports – The subcommittee reviewed copies of each significant type of incident report produced by San Jose police officers and retained by the department. In general, these reports include information describing various types of incidents that merit a police response. They include descriptions of suspects, information about victims, and the laws that have allegedly been violated. When an arrest is made, that information is included, as well. Most reports also include a narrative description of the incident or crime to which they pertain.

We concluded that it is appropriate for these reports to be public records, with certain sensitive information excepted. However, we agreed that two reports – those detailing juvenile contacts and reports of domestic violence – are sensitive enough to require special protections, and we are proposing some limits on access to those reports.

There are many reasons we decided in favor of openness, but two are worth special mention.

First, it is clear that the current state of the law allows the police department a level of discretion that does not work in favor of public understanding. For instance, in arrest incidents, California law now requires police departments to reveal “the factual circumstances surrounding the arrest.” A representative of the San Jose Police Department told the subcommittee that the department complies with this requirement merely by providing a list of the legal code sections allegedly violated by the arrestee. The representative conceded that a narrative summary of the arrest would comply more fully with “the spirit of the law,” and stated that the department is willing to prepare such summaries when automated field reporting (a technological solution which has not been budgeted, and, thus, not purchased) is implemented. But the subcommittee concluded that the simplest and fullest disclosure would result from releasing the summary already compiled by the department on its police reports.

Second, it is important for the task force to understand that many of these reports already become public when the case proceeds to court. All court records are public records, except in the rare circumstances where they are sealed. Many court files contain copies of the police report in the case, after it has been redacted to eliminate sensitive information in much the same way that the subcommittee is recommending.

Investigations – Police departments collect information in the course of an investigation. In the event of prosecution all investigatory material that is admitted into evidence becomes public through the court process. Questions often arise, however, when an investigation does not succeed. Was the investigation pursued vigorously? Were obvious leads neglected? Were proper police procedures followed? If a resident was wrongfully accused at some point in the process, what lay behind the suspicion? Answering these questions can help greatly in ensuring that the public trusts the department’s work.

For that reason, the subcommittee concluded that the public ought to have the right to review investigations after the need to protect the information has passed. This is one area where there is precedent in California for our recommendation: San Francisco has long made public the files of unsuccessful investigations. For consistency, we added the requirement that files of successful investigations become public after a case has concluded, but it is our expectation that most of the information on those cases will already have become public through the court process.

Protecting sensitive information – The primary objection offered to the release of police records is that sensitive information inevitably will be revealed along with more appropriate information. The full task force heard these concerns during the earlier public hearing. The subcommittee concluded that many of the concerns are misplaced.

Witnesses told the task force that it is critical to protect the identities of victims and those who may be wrongly accused. However, both of those pieces of information are already public under the California Public Records Act, Section 6254(f), except that the name of a victim of a sexual assault crime, domestic violence crime or hate crime may be withheld at the victim’s request. Nothing in our recommendations affects the status of that information, nor do we have the power to do so.

More appropriate concerns involve the need to ensure the successful conclusion of an investigation and to protect the safety of individuals involved in the investigation. The subcommittee has adopted language, modeled on what already exists in state law, to accomplish those critical goals. It is our expectation that these exemptions will make information public on a sort of “sliding scale”: Early in an investigation, the department would have greater need to withhold certain facts about an incident; once a prosecution proceeds, that need should diminish.

Finally, we have included language in the proposed ordinance to protect personal privacy, juveniles and victims of sex crimes. Again, we have consulted existing models to ensure this language achieves what we intend.

Statistical reports – Recent San Jose police department administrations have excelled in compiling and publicizing key statistical information about police activities – especially traffic stops and use of force. However, because leadership can change, the subcommittee concluded that the department should be required to continue these reports to the public. In addition, we are recommending a more expanded report on police misconduct that the city now produces, one that provides some information about how those complaints are resolved.

Personnel information – California law includes strong requirements making most police personnel information confidential. Among the protected information are the names of officers involved in disciplinary proceedings, and the reasons an officer may have been terminated from his job. While the subcommittee and task force heard recommendations that the city of San Jose should make this information public, the city does not have the power to do so.

Timing – The subcommittee is mindful that a new regimen for disclosure will place some burdens on the police department. After reviewing various forms used by the police department, we believe that the forms can be designed in such a way that will make it relatively simple to remove sensitive information. But because this effort will take time, and because some amount of training will also be needed, we propose that our recommendations not take effect until six months after they have received final council approval.

Section 5

Public Records

5.1 Public Information That Must Be Disclosed

5.1.1 Law Enforcement Information

5.1.1.010 Records Prepared By Law Enforcement

- A. All reports prepared by Law Enforcement, including “Police Report,” “Domestic Violence Supplemental,” “Property Report,” “Force Response Report,” Traffic Collision Report” and “Juvenile Contact Report,” are public records, except that:
 - 1. A “Juvenile Contact Report” is exempt from disclosure unless a juvenile has been charged with a crime and will be tried as an adult in criminal court.
 - 2. A “Domestic Violence Supplemental” is exempt from disclosure unless and until a Domestic Violence Supplemental is filed with the Superior Court. Any information redacted in the Domestic Violence Supplemental filed in Superior Court will remain exempt from disclosure.
- B. Investigatory records prepared by Law Enforcement are public records.

5.1.1.020 When Records Prepared By Law Enforcement Must Be Disclosed

- A. All reports prepared by Law Enforcement that are not exempt must be disclosed except as provided in Section 5.1.1.020(C).
- B. Investigatory records prepared by Law Enforcement must be disclosed when:
 - 1. The Law Enforcement agency has closed the case;
 - 2. The statute of limitations has expired; or
 - 3. If the case is prosecuted, at the time a judge or jury enters a conviction or acquittal.
- C. If a report or investigatory record is not exempt, but disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation where the prospect of prosecution is likely, that particular item of information may be redacted.

- D. If a particular item of information is redacted, the person responsible for withholding the information must explain that disclosure would either endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation. Without compromising the information Section 5.1.1.020(C) seeks to protect, the explanation must describe why disclosure would either endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation.

**5.1.1.030 Information That May Be Redacted From Records
Prepared By Law Enforcement**

Unless a report prepared by Law Enforcement or an investigatory record is requested by a person entitled to the information under state or federal law, the following information must be removed from the report or investigatory record before it is released:

- A. With respect to the victim of any crime, the address, telephone number or electronic mail address of the victim, except in response to a request made pursuant to Government Code section 6254(f)(3);
- B. With respect to the victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code, the name of the victim may be withheld at the victim's request, to the extent permitted by Government Code section 6254(f)(2);
- C. With respect to any person other than an arrestee or suspect, the address, telephone number or electronic mail address, any driver's license or California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number, if contained in the report;
- D. With respect to any person, including an arrestee or suspect, any social security number, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number, if contained in the report;
- E. The names of juvenile witnesses;
- F. The name of any juvenile arrestee or suspect, unless and until it has been determined that the juvenile will be charged and prosecuted as an adult, provided that the first name and initial letter of the last name of any juvenile arrestee or suspect shall remain on the report in any event;
- G. The identity of any confidential source.
- H. Any other information that is prohibited from disclosure by state or federal law.

Numerical or alphabetic designations should, to the extent practicable, be substituted for names omitted from any report.

5.1.1.040 Statistical Reports Prepared By The San Jose Police Department

The San Jose Police Department must produce:

- A. A quarterly report on traffic stops conducted by San Jose police officers, including ethnicity of the person stopped, some geographic designation of the location of the stop, whether the vehicle was searched and whether an arrest occurred.
- B. A quarterly report on the San Jose Police Department's use of force in arrests, including the ethnicity of the person arrested, some geographic designation of the location of the arrest, and the type of force used, by category (for example, firearms, tasers, batons, pepper spray, hands and feet).

5.1.1.050 Statistical Reports Prepared By The Independent Police Auditor

The Independent Police Auditor must maintain a report, kept separate from the personnel records of the Police Department, which reports the number and substance of citizen complaints against the Police Department or its officers, the number and types of cases in which discipline is imposed, and the nature of the discipline imposed. This record must be maintained in a format which assures that the names and other identifying information of individual officers involved is not disclosed directly or indirectly. However, a unique numerical or alphabetical designation should be assigned to each officer who is the subject of one or more complaints, so that the public can determine whether multiple complaints have been directed at a single officer and the nature of those complaints.

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5.4 Effective Date

This section will become effective six months after the City Council approves these recommendations.